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NO. 82-647

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
*Petitioner,*

v.

CHRISTIAN HOMES OF ABILENE, INC.,
and the 326TH DISTRICT COURT OF
TAYLOR COUNTY, TEXAS,
*Respondents.*

**On Writ Of Certiorari To The Texas Supreme Court**

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER UNWED FATHERS WHO HAVE NOT ESTABLISHED A SUBSTANTIAL RELATIONSHIP WITH THEIR NEWBORN NON-MARITAL CHILD POSSESS A FUNDAMENTAL RIGHT TO CUSTODY OF THAT CHILD AND TO FULLY PARTICIPATE IN THE REARING OF THAT CHILD EQUAL TO ALL OTHER CLASSES OF PARENTS.

2. WHETHER THE "BEST INTEREST OF THE CHILD" STANDARD EMPLOYED IN § 13.21, TEXAS FAMILY CODE, IS SO VAGUE OR OVERBROAD SO AS TO RESULT IN AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS IN ITS APPLICATION.

3. WHETHER THE DISSIMILAR TREATMENT OF UNWED FATHERS CONTAINED IN § 13.21, TEXAS FAMILY CODE, VIOLATES THE EQUAL PROTECTION RIGHTS OF THE PETITIONER UNWED FATHER.

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## BRIEF FOR RESPONDENT

## CONSTITUTIONAL PROVISION

### AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

## STATUTE INVOLVED

Texas Family Code § 13.21. Voluntary legitimation.

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the Texas Department of Human Resources may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.

(e) A suit under this section may be instituted at any time.

## STATEMENT OF THE CASE

Baby Girl S. was born on January 11, 1981, and has just recently celebrated her second birthday.[1] The mother of the child, Ms. S., was 15 years old at the conception of Baby Girl S. (J.A. 118a) and Petitioner, the father of Baby Girl S., was 24 years of age at the time of the birth. (J.A. 32a-33a) Ms. S. was 13 years old when Petitioner began his relationship with her. Petitioner and Ms. S. have never married and have never lived together. Petitioner has never participated in the rearing of Baby Girl S., has never had custody or control of Baby Girl S., has never supported Baby Girl S., has never established any emotional or psychological bond with Baby Girl S.,

1. Baby Girl S. was placed in the adoptive couple's home in September of 1982 by Christian Homes of Abilene, Inc. Even though there remained the possibility that Petitioner would seek review of the Texas Court's decision by This Honorable Court, it was felt, at that time, that the possibility of such review was remote because of This Honorable Court's refusal to grant Writ of Certiorari in *In the Interest of T.E.T.* in 1980 (603 S.W.2d 793 [Tex] cert. denied 450 U.S. 1025) and because it was felt that this Court's decision in *Caban v. Mohammed* (441 U.S. 380) was factually distinguishable because the present case involved a newborn child with whom the unwed father had established no substantial relationship. In light of legal precedent which was applicable to Baby Girl S., the decision was made to place the child with the intended adoptive couple because of the emotional and psychological ties which Baby Girl S. was developing daily with her foster family. It was felt that if Baby Girl S. continued to be raised by her foster family, a later disruption of that relationship would not be in her best interest. Even though she remains unadopted, she is establishing a growing relationship with the couple who desires to adopt her.

has never demonstrated any commitment to Baby Girl S. other than his judicial pursuit for custody which is the basis of this appeal, and indeed has never even seen the child.

Ms. S., an adolescent at the time of her pregnancy with Baby Girl S., sought the advice and counseling of her parents upon learning of her unwanted pregnancy. Over a period of time, Ms. S., along with Petitioner, Ms. S.'s parents and Petitioner's parents, considered the limited number of options available to her including marriage, having the child and raising it herself as a single parent, abortion, allowing Petitioner to raise the child as a single parent, or carrying the child full term in order to place the child for adoption. (J.A. 282a, 286a, 314a, 317a, 329a) Ms. S., herself an adopted child, and being relatively aware of the advantages of adoption, carefully considered her choices and chose to give birth to her child and place the child for adoption through Christian Homes of Abilene, Inc., Respondent herein. (J.A. 174a, 177a) Once she had made her decision, she possessed the emotional state of mind to have a medically uncomplicated term and gave birth to a healthy infant girl, Baby Girl S., the child the subject of this appeal.

Petitioner was never quite able to articulate a clear decision as to his future participation with Baby Girl S. until possibly the time of the filing of his petition for voluntary legitimation pursuant to § 13.21, Texas Family Code. (J.A. 137a, 161a, 163a, 167a, 284a, 288a) His ever changing attitude toward the child was always joined with his desire to marry Ms. S. (J.A. 153a, 159a) He was strongly influenced by the attitudes of his family that dictated marriage in all cases of pregnancy despite the

interest or welfare of the innocent child. (J.A. 158a, 272a)

From Petitioner's first knowledge of Ms. S.'s pregnancy until after the birth of Baby Girl S., Petitioner expressed a desire at times to consent to Baby Girl S.'s adoption, a desire at other times to assert his rights to Baby Girl S., a desire at still other times to do whatever Ms. S. wanted (J.A. 163a, 284a, 289a, 342a) and his relative position at any given time was dependent upon who had last talked with him. (J.A. 288a)

Although the Petitioner asserted at trial that he eagerly sought to support the mother during her time of pregnancy and to pay her medical and other related expenses in excess of $4,000.00, the record shows that Petitioner never contacted Christian Homes on that subject and that he in fact has never offered or attempted to pay through Christian Homes those expenses. (J.A. 354a) Although Petitioner asserts that he contributed to Baby Girl S.'s support, the record shows that he began sending one hundred dollars a month to the District Clerk's Office only after the filing of his petition for voluntary legitimation and solely upon the advice of his attorney. (J.A. 216a) Those payments were never received by Ms. S., or by Respondent and those funds were never used for the support or benefit of Baby Girl S. (J.A. 354a) Despite Petitioner's assertions that he was financially capable of providing for Baby Girl S.'s needs and necessities, the record shows that during Ms. S.'s stay at Christian Homes' maternity facilities, he, with the help of his father, only sent to Ms. S. a total of $70.00. (J.A. 194a)

Contrary to Petitioner's alleged eagerness to be informed of the welfare of the child, the record shows that

he never sought to contact Respondent on that subject (J.A. 355a) and that he never expressed interest in or concern for the welfare of Baby Girl S. in conversations with Ms. S. subsequent to the child's birth (J.A. 171a).

At the conclusion of the hearing on Petitioner's suit for voluntary legitimation, the trial court made the observation that Petitioner would be a proper person to have parental rights under perhaps other circumstances, but that those circumstances did not at that time exist. (J.A. 379a) The trial court denied Petitioner's suit for voluntary legitimation finding that it would not be in Baby Girl S.'s best interest. (J.A. 380a) The Court of Appeals for the Eleventh Supreme Judicial District of Texas affirmed the trial court's decision and its opinion is quoted verbatim in the Joint Appendix beginning at page 400a. The Texas Supreme Court denied Petitioner's Application for Writ of Error on July 14, 1982. (J.A. at 415a)

Baby Girl S. remains unadopted although she is daily forming emotional and psychological bonds with the couple with whom she has been and is presently living during a period in her life when the strength of such bonds are greatest and their positive influence for later life firmly grounded.

## SUMMARY OF THE ARGUMENT

Petitioner contends that he has the absolute right to participate in the custody and rearing of his child, Baby Girl S., based solely upon the fact of his biological fatherhood, and that because of such absolute right, the state must demonstrate a compelling need before divesting him of parental status. Respondent takes the position that the rights possessed by Petitioner and other unwed fathers

is not an absolute right but is conditioned upon a showing of facts which, in the child's best interest, would merit the legal recognition of the unwed father's parental status. The Texas Family Code, § 13.21, protects the unwed father's constitutionally protected right by allowing him a procedure whereby such a showing can be made. Petitioner employed that procedure in the Texas Court and his due process right to notice and hearing have, therefore, not been infringed.

Nor have Petitioner's due process rights been infringed by the application of the "best interest of the child" standard. Although Petitioner contends that the best interest standard is unconstitutionally vague and overbroad, it is the position of Respondent that such a standard, measured in the light of the unwed father's constitutionally protected rights to his non-marital child, allows the fact finder the ability to demonstrate on a case by case basis what should always be the paramount issue in all cases involving newborn non-marital children: the welfare of the child. Furthermore, by requiring the unwed father to make the requisite showing, the burden of proof is properly placed upon him as the one seeking to establish the parental status.

Petitioner also takes the position that the Texas statutory scheme violates his equal protection rights contending the gender and marital based classifications contained in such § 13.21, Texas Family Code, impermissibly discriminate between unwed fathers and unwed mothers and impermissibly discriminate between unwed fathers and wed fathers. Respondent takes the position that the unwed father is not similarly situated to other classes of "parents" and therefore, the dissimilar treatment con-

tained in § 13.21, Texas Family Code, is not constitutionally repugnant as a violation of equal protection.

Alternatively, even if the unwed father is similarly situated to other classes of parents, the dissimilar treatment serves the important governmental objective of protecting the welfare of the unwed mother and the welfare of the non-marital child, and the distinction contained in § 13.21, Texas Family Code, is substantially related to the achievement of those important governmental objectives. The gender and marital based classifications are, therefore, not violative of due process.

## ARGUMENT AND AUTHORITIES

### I.

### DUE PROCESS

#### A. Unwed fathers who have not established a substantial relationship with their newborn non-marital child do not possess the same substantive rights to their child as do all other classes of parents.

Petitioner contends that he possesses a fundamental parental right to his non-marital child, Baby Girl S., and that by being so possessed the state cannot disenfranchise him of that fundamental parental right without first demonstrating a compelling need. Petitioner contends that a "best interest of the child" standard is not constitutionally adequate to justify the preclusion of his rights to Baby Girl S. Respondent takes the position that the relative rights of an unwed father are not de-

pendent merely upon the existence of a biological relationship between the father and the child, but rather upon the nexus between that biological relationship and the emotional and psychological bond which may develop between the unwed father and his non-marital child.

Although unwed fathers in Texas are not automatically afforded the status of a parent,[2] there does not exist under Texas law an irrebutable presumption that all unwed fathers are unfit to occupy that status. In fact, the section of the Texas Family Code now under attack[3] provides the procedure whereby an unwed father can establish his parental rights by, among other things, demonstrating that there exists between himself and his non-marital child a sufficient bond so that the judicial recognition of that relationship would be in the child's best interest. Having so demonstrated, the unwed father, under Texas law, attains the legal status of a parent and such status cannot be extinguished but for a showing of unfitness.[4] Unwed fathers in Texas, therefore, who have established a substantial relationship with their children, are not denied due process of law by virtue of the provisions of § 13.21 of the Texas Family Code.

This Court has previously recognized the existence of constitutionally protected rights stemming from the relationship between family members and the bonds of the

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2. Section 11.01(3) *Texas Family Code* provides:
(3) "Parent" means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

3. Section 13.21 *Texas Family Code.*

4. Section 15.02 *Texas Family Code* is reproduced in its entirety in the Appendix hereto.

family unit. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the state had prohibited all schools from teaching any subject in any language other than English. The purpose of the statute was to avoid the teaching of ideas foreign to the "best interest of this country". The state's method, however, unconstitutionally interfered with the rights of parents to control the education of their children. This Court in *Meyer*[5] enunciated a liberty right of the individual "to marry, establish a home and bring up children. . . ." Following the *Meyer*[6] decision this Court decided other cases involving state statutes which interfered with the privacy realm of family life.

In 1925 this Court decided *Pierce v. Society of Sisters*, 268 U.S. 510, and held invalid an Oregon mandatory public school attendance statute which prevented parents from sending their children to private schools. In 1942, this Court decided *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which held unconstitutional Oklahoma's Habitual Criminal Sterilization Act. In 1972, this Court decided *Wisconsin v. Yoder*, 406 U.S. 205, which held unconstitutional a Wisconsin statute that compelled Amish to send their children to formal high school until age 16. In 1977, this Court decided *Moore v. City of East Cleveland*, 431 U.S. 494, and held unconstitutional as a violation of due process a housing ordinance which allowed only certain categories of related individuals to live together. The focus of these cases centers upon the sanctity of the family, the integrity of the family unit, and the importance of the interworking of the biological and psychological bonds between parents and children which contribute to the overall development of the child.

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5. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

6. Id., note 5.

Against this backdrop that the private realm of family life is entitled to fundamental protection is the development of family relationships which do not fall within the traditional sphere of the family unit. Living arrangements which have previously been socially unacceptable are becoming more and more prevalent. This Court has recognized that unmarried fathers under certain circumstances make good parents and that their parental rights should be recognized. For that reason, state statutes which universally exclude unwed fathers from the status of parent and which raise an irrebutable presumption as to the unwed father's unfitness without providing a means whereby the unwed father can overcome that presumption are unconstitutional as a violation of due process.

This Court in 1972 first considered the constitutionality of state statutes that deny to unwed fathers certain parental rights granted to unwed mothers, wed mothers and wed fathers in the case of *Stanley v. Illinois*, 405 U.S. 645 (1972). Previously this Court has been confronted with factual situations involving the unwed father and older non-marital children. Previously this Court has been confronted with factual situations wherein the unmarried father has had at least some relationship with the non-marital child beyond the mere biological fact of fatherhood. Previously hereto this Court has been confronted with factual situations where the granting of parental rights to the unwed father would not result in allowing the unwed father to benefit from his illegal conduct.[7] The case now before the Court involves an

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7. Ms. S. was 15 years old at the time she was impregnated by Petitioner who at that time was over 19 years of age. Section 28-319, Rev. Stat. of Nebraska, provides:

Sexual Assault; First Degree; Penalty

Any person who subjects another person to sexual penetration

infant. The only existing relationship between Petitioner and Baby Girl S., whose birth was the result of Petitioner's illegal conduct, is the fact that Petitioner is the biological father.

The facts of *Stanley*[8] were as follows: Joan and Peter Stanley had never married but had lived together intermittently for eighteen years during which time he fathered, raised and supported three children. When the children's mother died, they were declared wards of the state because, pursuant to the Illinois law, they were considered to no longer have any living "parent".[9] Peter Stanley wanted the children to continue living with him but was prevented from doing so because of the irrebutable presumption contained in the Illinois statute that all unwed fathers were unfit to be parents. Although the Illinois law required notice, hearing and proof of unfitness for all other classes of parents prior to the termination of their parental rights, the actual fitness of unwed fathers was deemed irrelevant.

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and (c) the actor is 19 years of age or older and the victim is less than 16 years of age is guilty of sexual assault in the first degree.

Section 28-318 provides that the Court may consider whether or not the victim received serious personal injury as a result of the sexual assault and defines serious personal injury to include pregnancy.

Terms, defined. As used in sections 28-318 to 28-323, unless the context otherwise requires:

. . .

(3) Serious personal injury shall mean great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;

Section 28-105, Rev. Stat. of Nebraska, provides a maximum penalty for sexual assault of 50 years incarceration in prison.

8. *Stanley v. Illinois*, 405 U.S. 645 (1972).

9. Id., note 8 at p. 558.

This Court disagreed and recognized that meaningful parent-child bonds can be established between an unwed father and his non-marital child. Respondent contends that the holding in *Stanley*[10] does not extend absolute parental rights to all unwed fathers but rather extends to the unwed father, in light of this Court's subsequent holding in *Quilloin v. Walcott*, 434 U.S. 236 (1978), a procedural due process protection of notice and hearing. When the unwed father can demonstrate that his relationship with his non-marital child equals or approximates a marital family relationship by demonstrating an actual reciprocal emotional and psychological bond with the child, such a father should be accorded parental rights commensurate with those of other classes of parents.

The case presently before this Court is distinguishable from *Stanley*.[11] First, the Texas statute involved[12] does not raise the irrebutable presumption that all unwed fathers should never attain the status of a parent. Section 13.21, Texas Family Code, provides the procedure whereby the unwed father can show that his relationship with the non-marital child equals or approximates a marital family relationship thereby affording the unwed father a means by which he can show that it would be in the child's best interest to legally recognize his factual status as a parent.

The second distinction between *Stanley*[13] and the present case is the lack of any relationship between Petitioner and the non-marital child. In *Stanley*,[14] the unwed father

10. Id., note 8.

11. Id., note 8.

12. Section 13.21 *Texas Family Code*.

13. Id., note 8.

14. Id., note 8.

had participated in his children's rearing and had supported the children both emotionally and financially for approximately 18 years. There existed between Peter Stanley and the children a *de facto* parent-child relationship which is lacking in the relationship between Petitioner and Baby Girl S.

Baby Girl S. was a newborn at the institution of Petitioner's original proceeding in Texas and she remains in the status of an unadopted infant. Petitioner has never established a parental relationship with Baby Girl S. Petitioner has never participated in the rearing of Baby Girl S. There has never been established a mutual emotional or psychological bond between Petitioner and the non-marital child. Petitioner has never seen the child, and there does not exist in fact a parent-child relationship between Petitioner and Baby Girl S.

Six years after this Court's holding in *Stanley v. Illinois*,[15] *Quilloin v. Walcott*[16] presented a challenge to a Georgia adoption statute that denied an unwed father the authority to prevent the adoption of his child while granting this veto power to all other living parents who were not found to be unfit or to have abandoned their children.[17] The Georgia consent to adoption statute required the consent of the unwed mother but not that of the unwed father to the adoption of their non-marital child. The issue in *Quilloin*[18] was the constitutionality of the Georgia adoption statute that effectively denied an unwed father the right to prevent the adoption of his non-marital

15. Id., note 8.

16. *Quilloin v. Walcott*, 434 U.S. 236 (1978).

17. Id., note 16 at footnote 2, p. 515.

18. Id., note 16.

child whom he had not legitimated by vesting all parental rights to a non-marital child in the natural mother.

*Quilloin*[19] involved a petition for the adoption of an eleven year old child by the husband of the child's natural mother. Although Leon Quilloin had acknowledged his fatherhood with occasional support and visits, he had never established a home with the child's natural mother, nor was the child in the custody or control of his father at any time. Unlike Peter Stanley, Leon Quilloin had never "shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child."[20] After receiving notice of the filing of the adoption petition, Leon Quilloin filed a petition to legitimate the child.

Although the trial court gave Quilloin a hearing on his fitness as a parent, it did not expressly find him unfit. Rather, the trial court decided that the adoption by Walcott, the natural mother's husband, was in the best interest of the child. In so doing, the trial court effectively terminated the parental rights of Leon Quilloin even though he had not been found unfit to continue a relationship with his child. The highest court of Georgia affirmed that decision and this Court by unanimous decision affirmed the decisions below.

The importance of this Court's holding in *Quilloin v. Walcott*[21] is its aid in understanding the extent of the holding of *Stanley v. Illinois.*[22] It is Respondent's position

19. Id., note 16.

20. Id., note 16 at p. 520.

21. Id., note 16.

22. Id., note 8.

that not all unwed fathers possess fundamental rights to their non-marital children. If a contrary conclusion were to be drawn from *Stanley*,[23] this Court's decision in *Quilloin*[24] would be inconsistent for the reason that Leon Quilloin could not have lost his parental status absent a finding of his unfitness. Since the best interest standard was applied in *Quilloin*[25] rather than the fitness test, it is Respondent's position that the rights of an unwed father to his non-marital child do not rise to the level of a fundamental right notwithstanding the fact of his biological fatherhood.

Although Peter Stanley may have, and probably did, possess a substantive right to his children because of the *de facto* parent-child relationship that existed between himself and his children, the facts that existed in *Quilloin*[26] did not create such a relationship so as to elevate Leon Quilloin to the status of a *de facto* parent. In *Stanley*[27] this Court stated that a "properly focused hearing"[28] should be afforded unwed fathers in custody and adoption proceedings. While Respondent would not presume to tell this Court what it meant by "properly focused hearing", perhaps the importance of this phrase is that what constitutes a proper hearing is dependent upon the facts of the individual case and the resulting status which the unwed father has attained as a result of those facts. For example, the relationship which Peter Stanley had with

23. Id., note 8.

24. Id., note 16.

25. Id., note 16.

26. Id., note 16.

27. Id., note 8.

28. Id., note 8 at footnote 9, p. 526.

his children equaled or approximated a parent-child relationship associated with all other classes of parents creating the presumptions of commitment associated with such a relationship. Stanley's relationship with his children had been created as a matter of fact and that relationship could only be terminated by showing a compelling reason. After this Court's decision in *Stanley*,[29] the state of Illinois afforded Peter Stanley a hearing properly focused on the issue of child neglect.[30]

On the other hand, the relationship between Leon Quilloin and his child did not as a matter of fact rise to the level of a parent-child relationship. Leon Quilloin had only occasionally visited his child and only sporadically contributed to the child's support. He had never lived with or had custody of the child. Leon Quilloin's relationship with the child was at best tenuous. Therefore, the hearing afforded Leon Quilloin, having not factually attained the plateau of a parent, was properly focused on the child's best interest.

The facts of the present case more approximate the facts of *Quilloin v. Walcott*[31] than they do the facts of *Stanley v. Illinois*.[32] Petitioner, as Leon Quilloin, has never had custody of his non-marital child. Petitioner, as Leon Quilloin, has never participated in the rearing of his non-marital child. Petitioner, as Leon Quilloin, has never contributed to the regular support of his child, although he did, after the filing of his petition to legitimate, deposit money into the registry of the court upon the advice of

29. Id., note 8.

30. "Family Law Cases and Materials"; Judith Areen (1978) p. 155.

31. Id., note 16.

32. Id., note 8.

his attorney. As in *Quilloin*,[33] the child, Baby Girl S., would be adopted by the family with whom she is already living should this Court affirm the decisions below. The hearing in both *Quilloin*[34] and the present case was properly focused on the child's best interest since neither Leon Quilloin nor Petitioner had factually attained the status of a parent.

In 1979 this Court in *Caban v. Mohammed*, 441 U.S. 380 (1979), examined the constitutionality of a New York statute that required only the natural mother's consent to the adoption of her non-marital child.[35] Abdiel Caban and Maria Mohammed had lived together for a five year period between September, 1968, and December, 1973, in New York City during which time they represented themselves as husband and wife although they were never legally married. New York law did not recognize common-law marriage under any circumstances.[36] Caban

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33. Id., note 16.

34. Id., note 16.

35. The New York law provided that consent to adoption was required of only the following individuals or agencies:

(a) Of the adoptive child, if over 14 years of age, unless the judge as surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

36. *Rahill v. 645 Restaurant Corp.*, 59 App. Div. 2d 988, 399 N.Y.2d 342 (1977).

Texas, however, does recognize common-law marriage. *Humphreys v. Humphreys*, 364 S.W.2d 177 (Tex.) Reh. denied, rev'd. on other grounds.

Had the *Caban* facts existed in the present case, Petitioner's rights to Baby Girl S. could not have been diminished without proof by

had lived with and supported the family until Maria Mohammed left him taking their two children with her. She began living with, and later married, Kazim Mohammed. During the two years that followed, Caban remained in constant contact with the children. In January, 1976, Maria and Kazim Mohammed filed a petition for adoption. Two months later, Abdiel Caban, joined by his wife, filed a cross-petition for adoption. The New York Court granted the Mohammeds' petition basing its decision on the New York statute that provided in part that only the consent of the mother was required in adoptions involving children born out of wedlock.[37] Since Maria Mohammed withheld her consent, Caban was foreclosed from adopting the children. This Court reversed the New York decision holding that a state adoption law that requires only the mother's, and not the natural father's, consent to the adoption of a non-marital child violates the Equal Protection Clause of the Fourteenth Amendment because it bears no substantial relationship to the State's interest in facilitating the adoption of children born out of wedlock.

Although this Court's holding in *Caban*[38] is based upon equal protection principles rather than due process as was *Stanley*[39] and *Quilloin*,[40] an examination of the holding is

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clear and convincing evidence that he had engaged in one or more of the acts or omissions contained in section 15.02 Texas Family Code which is reproduced in its entirety in the Appendix to Respondent's Brief on the Merits, for the reason that there would have existed between Petitioner and Ms. S. the legally recognized relationship of marriage.

37. Id., note 35.

38. *Caban v. Mohammed*, 441 U.S. 380 (1979).

39. Id., note 8.

40. Id., note 16.

helpful in analyzing the nature and extent of the rights of unwed fathers. Since the classification in *Caban*[41] involved gender, this Court applied the intermediate standard of scrutiny.[42] In order for a statute containing a gender based classification to pass constitutional muster, the classification must first serve important governmental objectives and must be substantially related to the achievement of those objectives. This Court recognized the important state objective of promoting the welfare of non-marital children through adoption. The New York statute, therefore, fulfilled the first part of the test. However, the statute failed the second part of the test because this Court found that the gender classification was not substantially related to the articulated state interest.

The importance of the holding in *Caban*[43] is that it illustrates that *Stanley*[44] did not declare a fundamental right in all unwed fathers to their non-marital children. Classifications involving fundamental rights must be measured by the strict scrutiny standard in order to be constitutionally valid under the Equal Protection Clause of the Fourteenth Amendment. *Moore v. City of East Cleveland*;[45] *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticutt*, 381 U.S. 479 (1965); *Kramer v. Union Free School District*, 395 U.S. 479 (1965); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *NAACP v. Button*, 371 U.S. 415 (1963).

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41. Id., note 38.

42. *Craig v. Boren*, 429 U.S. 190 (1976).

43. Id., note 38.

44. Id., note 8.

45. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

While this Court seems willing to grant substantive rights to an unwed father, it has not been willing to give the unwed father the same substantive rights accorded to all parents. Unwed fathers have a constitutionally protected interest in their children and they are entitled to some degree of protection. This Court has, however, been unwilling to raise this interest to the status of a fundamental right.

Since unwed fathers do not ipso facto possess fundamental rights to their children, statutes which exclude them from the definition of a parent but which provide a procedure whereby they can attain that status do not violate procedural due process protection afforded unwed fathers. The statutes involved in *Stanley*[46] and *Caban*[47] did not contain such a procedure but established irrebutable presumptions which precluded the unwed fathers from attaining a participating role in their children's lives. On the other hand, *Quilloin v. Walcott*[48] did contain such a procedure and the constitutionality of the Georgia procedure was unanimously upheld by this Court.

**B. The "best interest of the child" standard employed in § 13.21, Texas Family Code, is not so vague or overbroad so as to violate Petitioner's right to due process.**

This Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982), does not strengthen Petitioner's argument that the Texas statutory scheme involved violates his pro-

46. Id., note 8.

47. Id., note 38.

48. Id., note 16.

cedural due process rights for the reason that *Santosky*[49] involved the termination of an existing parental relationship. In *Santosky*[50] this Court examined the constitutionality of a New York statute that allowed the termination of parental rights on the finding of the child's "permanent neglect", and further required such a finding on a "fair preponderance of the evidence". This Court held that the standard employed by New York was inadequate for the reason that the preponderance standard did not adequately convey to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. This Court reasoned that since the private interest, i.e. the termination of the already existing parent-child relationship is "commanding and the threatened loss is permanent", a preponderance standard does not "fairly allocate the risk of an erroneous fact finding between the State and the natural parents".

Petitioner's original proceeding was to establish his parental rights to Baby Girl S., and although the ultimate effect of a future adoption of Baby Girl S. will effectively terminate Petitioner's interest in the child, he had not and has not attained that level of status which triggers the application of the *Santosky*[51] holding. If, on the other hand, Petitioner had attained parental status, a showing of his parental unfitness would be required before that status could be terminated. A showing of unfitness would be required by "clear and convincing evidence". The rationale of *Santosky*[52] would therefore be applicable, and

49. *Santosky v. Kramer*, 455 U.S. 745 (1982).

50. Id., note 49.

51. Id., note 49.

52. Id., note 49.

Texas courts would apply that standard pursuant to the Texas Supreme Court's holding in *In Re G.M.*, 596 S.W. 2d 846 (Tex. 1980).

Petitioner further contends that the "best interest of the child" standard as contained in § 13.21, Texas Family Code, is unconstitutionally vague and over-broad. Respondent does not question that statutes which forbid or require the doing of an act in terms so vague that men of common intelligence must guess at its meaning are constitutionally invalid. *Lanzetta v. New Jersey*, 452 U.S. 18 (1981). Nor does Respondent question that even a clear and precise enactment may nevertheless be over-broad if in its reach it prohibits constitutionally protected conduct. *Grayned v. Rockford*, 408 U.S. 104 (1972). Respondent does, however, question Petitioner's assertion that the statute in question which employs a "best interest of the child"[53] standard is either unconstitutionally vague or unconstitutionally over-broad.

The constitutionally protected right which unwed fathers such as Petitioner possess in their non-marital child is the procedural due process right to notice and hearing in any suit affecting their interest in their non-marital child. Respondent does not believe that the best interest standard is unconstitutionally vague. The standard employed in establishing an otherwise non-existent parental right must be flexible so as to afford each individual case the degree of scrutiny which such an important decision deserves. Any standard containing rigidly itemized characteristics which must be attained before the establishment of the legally recognized status of a parent would surely be struck down as excluding certain com-

53. Id., note 3.

binations of attributes which would necessarily occur because of the very complexities of human life. By utilizing a "best interest" standard, the fact finder can consider the relative merits of all concerned including, as involved in this case, the benefit which Petitioner would derive from his illegal liaison with Ms. S. which resulted in the ultimate birth of Baby Girl S.

How is the "best interest" standard over-broad? The constitutionally protected interest involved in the present case is Petitioner's procedural right to demonstrate his commitment to Baby Girl S., thereby showing that it would be in the child's best interest to allow him to be recognized as a parent. The "best interest" standard, rather than being over-broad, is restrictive for the reason that it requires the fact finder to focus in on the limited question of the welfare of the child while at the same time allowing each case to be decided on its own individual merit. A standard which provides for the establishment of a parent-child relationship must not only protect the rights of the unwed father but also the rights of the mother and perhaps most importantly the rights of the innocent child. Although Petitioner criticizes the "best interest of the child" standard as being too broad and too vague, such a standard provides guidance for the fact finder in cases in which an examination of the rights of unwed parents may be inadequate. The standard employed by Texas provides the opportunity to give objective evidence of the "best interest" of the child so that the various controversies concerning the rights of both the natural and adoptive parents would not overshadow what should be the ultimate concern of any adoption proceeding: the welfare of the child.

## II.

## EQUAL PROTECTION

### A. Fathers of newborn non-marital children are not similarly situated to unwed mothers or to wed fathers. Therefore, the dissimilar treatment of unwed fathers contained in § 13.21, Texas Family Code, does not violate the equal protection rights of Petitioner.

Petitioner contends that there is an impermissible gender based as well as an impermissible marital based classification contained in § 13.21, Texas Family Code, because as Petitioner contends, unwed fathers are treated differently than are unwed mothers and unwed fathers are treated differently than are wed fathers. Petitioner contends that all unwed fathers are similarly situated to unwed mothers and wed fathers and that the dissimilar treatment contained in § 13.21, Texas Family Code, violates his equal protection rights.

The function of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is to measure the constitutional validity of classifications created by state laws. *Parham v. Hughes*, 441 U.S. 347 (1979). In cases where individuals are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity.[54] *Reed v. Reed*, 404 U.S. 71.

The Texas statutory scheme presumes all wed and unwed mothers and all wed fathers to be "parents".[55] Unwed

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54. *Parham v. Hughes*, 441 U.S. 347, 60 L.Ed.2d 269, 99 S.Ct. 1742.

55. Id., note 2.

fathers do not possess this presumption and must employ the provisions of § 13.21, Texas Family Code, to establish such status by showing the child's best interest. The presumed parents, however, cannot be divested of their parental status but for a showing of unfitness together with a showing of best interest pursuant to § 15.02, Texas Family Code. The reason for the dissimilar treatment, Respondent contends, is based upon the fact that unmarried fathers do not in all cases necessarily share a similar commitment and are not otherwise similarly situated to the newborn child as is the mother or the wed father.

Mothers exhibit their actual commitment to their children by carrying and bearing their children. Ms. S. exhibited such a commitment. Wed fathers are presumed by law to be committed to their offspring. All children born within the institution of marriage are presumed to be legitimate offspring of the father and it is presumed that the father will contribute to the development of the child's mental health by his day-to-day interaction with them. Unwed fathers, however, have been entitled to no such presumption because they are situated differently than mothers and wed fathers.[56]

The Texas Supreme Court has recognized the fact that unwed fathers are not similarly situated to the unwed mother. Justice Barrow writing the majority opinion in *In the Interest of T.E.T.*, 603 S.W.2d 793 (Tex.) cert. denied, 450 U.S. 1025, stated at page 797:

> The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical

56. "Doctrine of Family Integrity: Protecting the Paternal Rights of Unwed Fathers Who Have Substantial Relationships With Their Children." Con. L. Rev. 13:145, p. 155.

> burden and responsibilities of the pregnancy. She can choose to abort the child or she can carry it full term. . . .
>
> On the other hand, the biological father is not automatically responsible for the child. He may not have an interest in legitimating the child. He may not promptly disclose his interest in the child. In most situations, he can wait until after the child is born before committing himself. While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility with respect to the child. To classify him as a parent simply because he is the biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother. All must agree that an unmarried fourteen year old high school freshman has a serious problem when she discovers she is pregnant and she needs all the options that the State can properly make available to her.

This Court has acknowledged the fact that young women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy. In the case of *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981), (a case involving the California statutory rape statute) Justice Stewart in his concurring opinion stated:

> Young men and women are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is realistically related to the legitimate State purpose of reducing those problems and risks.

Justice Stewart reasoned that pregnant unmarried females confront different and more severe problems than their male partners and stated:

> She alone endures the medical risk of pregnancy or abortion. She suffers disportionately the social, educational, and emotional consequences of pregnancy. Recognizing this disproportion, California has attempted to protect teenage females by prohibiting males from participating in the act necessary for conception.

Justice Rehnquist expressed even stronger views which were joined by Chief Justice Burger, Justice Stewart and Justice Powell:

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant and suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. . . .
>
> Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. . . .

Justice Rehnquist continued:

> But we find nothing to suggest that men, because of past discrimination or particular disadvantages, are in need of the special solitude of the courts. Nor is this a case where a gender classification is made "solely for administrative convenience" . . . or rests on "the baggage of sexual stereotypes" . . . as we have held, the statute instead reasonably reflects that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male.

In *Caban v. Mohammed*[57] this Court in the majority opinion alluded to the fact that, in matters concerning newborns, the unwed father may not be similarly situated to the unwed mother. At page 305,[58] Justice Powell writing for the majority stated:

> Even if unwed mothers as a class were closer than unwed fathers to the newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinction as the age of the child increased.

The concern which the dissent in *Caban* had was that the majority opinion would receive too broad an interpretation endangering the welfare of newborns and infants. The dissenters addressed both the dissimilar status of unwed fathers to unwed mothers and the dissimilar status of unwed fathers to wed fathers. Addressing the marital distinction, Justice Stewart stated at page 310:[59]

> The constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. In this setting, it is plain that the absence of a legal tie with the mother provides a constitutionally valid ground for distinction.

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57. Id., note 38.

58. Id., note 38.

59. Id., note 38.

Addressing the gender classification Justice Stewart stated beginning at page 311:[60]

> With respect to a large group of adoptions—those of newborn children and infants—unwed mothers and unwed fathers are simply not similarly situated . . . Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested. . . .
>
> Men and women are different, and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out of wedlock. Because most adoptions involve newborn infants or very young children, it is appropriate at the outset to focus on the significance of the difference in such cases.
>
> Both parents are equally responsible for the conception of a child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person. If during pregnancy the mother should marry a different partner, the child will be legitimate when born and the natural father may never even know that his "rights" have been affected. On the other hand, only if the natural mother agrees to marry the natural father during that period can the latter's action have a positive impact on the status of the child; if he instead should

60. Id., note 38.

marry a different partner during that time, the only effect on the child is negative, for the likelihood of legitimacy will be lessened. These differences continue at birth and immediately thereafter. During that period, the mother and child are together; the mother's identity is known with certainty. The father, on the other hand, may or may not be present; his identity may be unknown to the world and may even be uncertain to the mother. . . .

There no doubt are cases in which the relationship of the parties at birth makes it appropriate for the State to give the father a voice of some sort in the adoption decision. But as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process.

Most particularly, these differences justify a rule that gives the mother of a newborn infant the exclusive right to consent to its adoption. Such a rule gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. It also gives the loving father an incentive to marry the mother, and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible.

With this much the Court does not disagree; it confines its holding to cases such as the one at hand involving the adoption of an older child against the wishes of the natural father who previously has participated in the rearing of the child and who admits paternity.

The statute involved in *Caban*[61] was found unconstitutional because the distinction found in the New York statute was not substantially related to the achievement of the state's important objective of promoting the welfare of non-marital children through adoption. Under the factual situation contained in *Caban*[62] the children were older and the unwed father had established a substantial relationship with his children. In *Caban*,[63] Abdiel Caban and Maria Mohammed were similarly situated because of the relationship which had developed over approximately seven years between Abdiel Caban and his children. They were also similarly situated because they were both legally able to consent to the sexual act which ultimately resulted in Maria's pregnancy, whereas Ms. S. was not.

In the present case, Petitioner has not established such a parental relationship with Baby Girl S. At the hearing on Petitioner's suit to legitimate, Petitioner was not similarly situated to Ms. S. because she had already demonstrated her commitment to Baby Girl S. by carrying the child and giving birth. The depth of her commitment was evidenced by her decision to give up the child and to place it in a home for adoption where she knew it would be raised by two mature parents who could properly provide for the child. (J.A. 177a) Ms. S.'s commitment was demonstrated by her realization that she, as a fifteen year old single parent, could not properly provide for the child. (J.A. 178a) Her commitment was demonstrated by her realization that Petitioner, whom she knew probably better than anyone else, was not capable to best

61. Id., note 38.

62. Id., note 38.

63. Id., note 38.

care for her child and that if her child was relinquished to Petitioner, Baby Girl S. would be raised by surrogate part-time parents including Petitioner's parents, grandmother and sisters, none of whom have demonstrated any commitment to the child, but who have demonstrated rather that "marriage, right or wrong" is the only alternative to non-marital pregnancy.

**B. The gender and marital based classifications contained in § 13.21, Texas Family Code, serve the important governmental objections of protecting the welfare of unwed mothers and non-marital children, and those classifications are substantially related to the achievements of those important governmental objections. Therefore, the classifications contained in § 13.21, Texas Family Code, do not violate Petitioner's rights to equal protection.**

Although Respondent does not feel that Petitioner and Ms. S. were similarly situated and does not feel that the unwed fathers of newborns in general are similarly situated to unwed mothers of newborns, if this Court decides that they are, the dissimilar treatment contained in § 13.21, Texas Family Code, fulfills the two-pronged test applied in *Caban v. Mohammed*[64] and therefore, the dissimilar treatment contained in § 13.21, Texas Family Code, does not violate the equal protection rights of the unwed father.

In *Caban*[65] this Court recognized that the state has an important objective in protecting the welfare of children

64. Id., note 38.

65. Id., note 38.

born out of wedlock through adoption. The Texas Supreme Court, in upholding the constitutionality of § 13.21, Texas Family Code,[66] recognized the State's objective in promoting the welfare of non-marital children and also recognized the State's interest in the welfare of the unwed mother. Justice Barrow writing the majority opinion in *In the Interest of T.E.T.*[67] stated at page 797:

> The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. This statute is substantially related to the achievement of that interest.

In regard to the State's objective in promoting the welfare of the child, Justice Barrow stated at page 797:[68]

> The narrow issue before us is whether the gender based distinction of the Texas statutory scheme for establishing status as a parent is substantially related to the important State objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of this objective. We hold that it is so related.

The statute involved in *Caban*[69] failed to be substantially related to the articulated state interest and was therefore, held to be an unconstitutional violation of equal

66. *In the Interest of T.E.T.*, 603 S.W.2d 793 (Tex.) cert. denied 450 U.S. 1025.

67. Id., note 64.

68. Id., note 66.

69. Id., note 38.

protection. It is Respondent's position that § 13.21, Texas Family Code, is substantially related to the achievement of promoting the welfare of the unwed mother by allowing her the decision-making capability concerning her unborn child free from the absolute veto of the unwed father. Furthermore, § 13.21, Texas Family Code, is substantially related to the achievement of promoting the welfare of newborn children by allowing their prompt adoption while at the same time providing the concerned unwed father the capability of establishng parental rights, thus arming him with veto authority of the child's adoption.

Furthermore, the state has a legitimate interest in having the ability to quickly place the newborn child for adoption. As observed in *Caban*,[70] statistics from New York which appear to approximate the national average indicate that 90% of children adopted are under the age of six, that 66% of all children adopted are under the age of one, and that 75% of all adoptive parents prefer to adopt a child under the age of three years. The median age of a child at the time of adoption appears to be five months.

A concerned unwed father is protected by the provisions of § 13.21, Texas Family Code, which allows him the procedure to show his relationship with his child. By providing a workable procedure for the state to place the infant or newborn for adoption at an optimal age, and by likewise providing a procedure for the protection of the concerned unwed father, Texas protects not only its interest in the welfare of the non-marital child but does so in a manner which does not arbitrarily or unconstitutionally infringe on the rights of the concerned unwed father.

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70. Id., note 38 at footnote 7, p. 7.

This Court held that the New York statute involved in *Caban*[71] was unconstitutional because it was not substantially related to the articulated state objective. This Court reasoned that the State cannot assume that an unmarried mother always has a closer relationship with her child and that her interest in the child is always more important so that only her consent is merited in adoption proceedings. It is Respondent's position that in cases involving newborn children, the state can properly assume that the mother bears a closer relationship with her child whom she has chosen to carry full term as long as the assumption is not irrebutable. It is not irrebutable in Texas. Section 13.21, Texas Family Code, provides the procedure whereby the concerned unwed father can overcome that assumption by demonstrating on a case by case basis his relationship with the child thereby showing that the child's best interest would be served by allowing legal recognition of his factually existent parentage.

This Court also reasoned in *Caban*[72] that the New York statute was not substantially related to the articulated state objective for the reason that there was no basis for assuming that the unwed father would consent to adoption any less frequently than the unmarried mother thereby hindering the important state objective of promoting adoption of non-marital children. Because of the affirmative procedure contained in § 13.21, Texas Family Code, the concerned unmarried father can assert his interest in the child and therefore, there does not exist under § 13.21, Texas Family Code, the universal assumption which this Court found repugnant in *Caban*.[73]

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71. Id., note 38.

72. Id., note 38.

73. Id., note 38.

Finally, this Court reasoned in *Caban*[74] that the New York Statute was constitutionally infirm for the reason that even if it might be difficult to locate and identify an unwed father at birth, possibly justifying a distinction between unmarried mothers and unmarried fathers, this problem could decrease after infancy. It is Respondent's position that this last reason stated by this Court in holding the New York statute over-broad is precisely the justification for the distinction employed by Texas in not automatically treating unwed fathers as parents. If the mere fact of biological fatherhood created fundamental parental rights in all biological fathers, the state would be required in all unmarried births to seek out all concerned and all unconcerned fathers as well as all "rapists, sperm donors, and hit-and-run lovers",[75] before any child could begin establishing the family bond to which that child has a constitutionally protected right and which the state has a valid objective in protecting.

## CONCLUSION AND PRAYER

Although unwed fathers possess certain constitutionally protected rights to their non-marital children, this Court has in the past refused to recognize in the unwed father an absolute right to his children. Because of the state's statute involved in *Stanley v. Illinois*,[76] Peter Stanley was denied his right to continue in the rearing of his non-marital children with whom he had established a substantial relationship. This Court properly held that under

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74. Id., note 38.

75. Id., note 66 at p. 795.

76. Id., note 8.

those facts, Stanley's due process rights to his children were unconstitutionally violated.

*Quillion v. Walcott*,[77] demonstrated this Court's desire to limit the protection afforded unwed fathers, under proper factual circumstances, to a procedural protection. Unwed fathers have not in the past been afforded the same substantive due process rights to their non-marital children as have other classes of parents.

This Court's latest pronouncement of the rights of the unwed father occurred in *Caban v. Mohammed*,[78] a case which involved the right of an unwed father who had established a substantial relationship with his older non-marital children to veto their adoption. Although decided on equal protection grounds, the test employed by this Court to measure the constitutionality of the New York statute which contained a gender based classification demonstrated again this Court's unwillingness to recognize a fundamental right in the unwed father to his non-marital children.

Respondent urges this Court, based upon the procedural safeguards enunciated in *Stanley*[79] and *Quilloin*[80] and the equal protection safeguards enunciated in *Caban*,[81] to recognize the constitutionally protected rights of unwed fathers but to do so in the limited posture set forth in *Stanley*[82] where the unwed father has established a substantial relationship with his child, and to strictly limit

77. Id., note 16.

78. Id., note 38.

79. Id., note 8.

80. Id., note 38.

81. Id., note 8.

82. Id., note 38.

the application of *Caban*[83] to factual situations involving older children with whom the unwed father has established a parental bond. Respondent urges this Court not to extend the application of *Caban*[84] to the facts of the present case which involves a newborn with whom the unwed father has not established any relationship.

The Texas Family Code, § 13.21, provides the procedure whereby the unwed father can demonstrate the commitment which he has to his newborn child. Petitioner employed that procedure and fully participated at the hearing but failed to make the requisite showing of Baby Girl S.'s best interest. Petitioner's right to Baby Girl S. have not been violated as he has been provided the procedure by which he was allowed to attempt to demonstrate the existence of a relationship between himself and his child.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the holdings of the Courts below be in all things AFFIRMED.

Respectfully submitted,

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83. Id., note 38.

84. Id., note 38.

## CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Respondent's Brief on the Merits have been mailed to Marcia Robinson Lowry, Counsel of Record for Petitioner, American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York 10036, postage prepaid, return receipt requested and that three (3) copies of Respondent's Brief on the Merits have been mailed to Counsel of Record for the State of Texas, David R. Richards, Executive Assistant Attorney General of the State of Texas, P. O. Box 12548, Austin, Texas 78711, on the _____ day of March, 1983.

CHARLES E. MYERS

# APPENDIX

## TEXAS FAMILY CODE

### Section 15.02. Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.